

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
LARRY D. VAUGHT, JUDGE

DIVISION IV

CA06-247

October 4, 2006

ALBERT GORDON JUNGE
APPELLANT

V.

TEMPLE-INLAND PAPERBOARD &
PACKAGING, AMERICAN HOME
ASSURANCE CO., ESIS, TPA, SECOND
INJURY FUND and DEATH &
PERMANENT TOTAL DISABILITY
TRUST FUND

APPELLEES

APPEAL FROM THE ARKANSAS
WORKERS' COMPENSATION
COMMISSION
[NO. F304405]

AFFIRMED

Appellant Albert Junge appeals from a decision of the Workers' Compensation Commission and argues that it erred in concluding that Second Injury Fund liability was not applicable in this case, that Junge was not permanently and totally disabled, and that Junge was entitled to twenty-eight percent wage-loss disability. We affirm.

Junge sustained an injury to his right shoulder while at work on February 7, 2003. The injury was accepted as compensable, and Junge underwent two surgeries. Following the second surgery, he complained of pain and limited use of his shoulder. On January 20, 2004, Dr. William Sherrill concluded that Junge had reached maximum medical improvement for his shoulder injury and that whether Junge could return to work would depend on the availability of a restricted job because he was unable to lift more than five pounds with his

right arm. In an August 10, 2004, letter Dr. Sherrill assigned Junge an eleven-percent impairment rating to his right arm due to limited motion and a total impairment rating of twenty percent to his right upper extremity based on observations that Dr. Sherrill made during Junge's surgery.¹

During his testimony, Junge stated that he was unable to return to work because appellee did not have restricted jobs available. He stated that he had trouble using his right hand and that his disability prevented him from doing any assembly-line work or typing. He stated that he became fatigued easily and had to rest often. He testified that he had attended three years of college, majoring in the field of business administration; that he had retired from the Air Force where he had served as an officer and had been trained as a pilot; that he had experience in managerial and supervisory positions in both the military and private sector; and that at the time of his injury, he had worked for appellee for seven years in a manual-labor position because he had trouble finding work within his field. He acknowledged that he had considered early retirement. He admitted that he had not made "any effort to find work somewhere other than [with appellee]" because of his age, work experience, and disabilities.

Prior to his injury, Junge had been diagnosed with hypertension and Type II diabetes,

¹This letter clarified Dr. Sherrill's opinion as to Junge's impairment rating, which was necessary because Dr. Sherrill's first letter assigned Junge an impairment rating of eleven percent to his right arm and an *additional* twenty-percent impairment rating to his right upper extremity because of significant strength loss.

both of which were controlled by medication. Junge testified that he began having symptoms of Parkinson's disease in the summer of 2002. At first, he noticed his leg "shaking" and by December of 2002 he discussed it with his physician. He saw neurologist Dr. Margaret Tremwel on December 12, 2002. In her notes, Dr. Tremwel indicated that Junge had been experiencing a "slowing of his gait" for about a year; that Junge's wife had complained that Junge had a mildly stooped posture; that Junge had experienced tremors in his lower extremities and occasionally in his upper right extremity; that Junge had noticed a tendency to slap his left foot on the ground when walking; that Junge had general fatigue in his legs after extended walking; and that Junge had been drooling for about a month. Following her examination, Dr. Tremwel noted that Junge had mildly stooped posture with a mild decrease in stride and reduction in arm swing. Her impression was that he suffered from mild Parkinson's disease. She ordered an MRI and started him on Mirapex.

The Commission adopted the findings and conclusions of the Administrative Law Judge and found (1) that the Second Injury Fund was not liable in this case because Junge was not experiencing some degree of "permanent physical impairment" or "disability" at the time of his compensable injury as required by Ark. Code Ann. § 11-9-525 (Repl. 2002); (2) that the evidence presented supported a permanent physical impairment rating of seventeen percent to the body as a whole as a result of Junge's shoulder injury; and (3) that Junge's permanent functional disability (wage-loss disability) was twenty-eight percent to his body as a whole because of his shoulder injury.

When reviewing a decision of the Workers' Compensation Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the findings of the Commission, and we affirm that decision if it is supported by substantial evidence. *Searcy Indus. Laundry Inc. v. Ferren*, 82 Ark. App. 69, 110 S.W.3d 306 (2003). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* at 72, 110 S.W.3d at 307. We will not reverse the Commission's decision unless we are convinced that fair-minded persons with the same facts before them could not have reached the conclusions arrived at by the Commission. *Id.*, 110 S.W.3d at 307. In making our review, we recognize that it is the function of the Commission to determine the credibility of witnesses and the weight to be given their testimony. *Id.*, 110 S.W.3d at 307. Furthermore, the Commission has the duty of weighing medical evidence and, if the evidence is conflicting, its resolution is a question of fact for the Commission. *Id.*, 110 S.W.3d at 307.

For his first point on appeal, Junge argues that the Commission erred in determining that Second Injury Fund liability did not exist. Arkansas Code Annotated section 11-9-525 addresses Second Injury Fund liability and provides that:

the Fund is established and designed to insure that an employer employing a handicapped worker will not, in the event such worker suffers an injury on the job, be held liable for a greater disability or impairment than actually occurred while the worker was in the employer's employment. The employee is to be fully protected in that the Second Injury Fund pays the worker the difference between the employer's liability and the balance of his disability or impairment which results from all disabilities or impairments combined.

Ark. Code Ann. § 11-9-525(a)(1), (2). The section later states that:

If any employee who has a permanent partial disability or impairment, whether from compensable injury or otherwise, receives a subsequent compensable injury resulting in additional permanent partial disability or impairment so that the degree or percentage of disability or impairment caused by the combined disabilities or impairments is greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of combined disabilities or impairments, then the employer at the time of the last injury shall be liable only for the degree or percentage of disability or impairment which would have resulted from the last injury had there been no preexisting disability or impairment.

After the compensation liability of the employer for the last injury, considered alone, which shall be no greater than the actual anatomical impairment resulting from the last injury, has been determined ... the degree or percentage of [the] employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined ... and the degree or percentage of disability or impairment [that] existed prior to the last injury plus the disability or impairment resulting from the combined disability shall be determined, and compensation for that balance, if any, shall be paid out of the [Second Injury Trust Fund].

Ark. Code Ann. § 11-9-525(b)(3), (4). Our supreme court has stated that three hurdles must be overcome before the liability of the fund becomes an issue. "First, the employee must have suffered a compensable injury at his present place of employment. Second, prior to that injury the employee must have had a permanent partial disability or impairment. Third, the disability or impairment must have combined with the recent compensable injury to produce the current disability status." *Mid-State Constr. Co. v. Second Injury Fund*, 295 Ark. 1, 5, 746 S.W.2d 539, 541 (1988). Arkansas Code Annotated section 11-9-102(8) (Supp. 2005) defines "disability" as the "incapacity because of compensable injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of the compensable injury." A numerical impairment rating on pre-existing diseases, illnesses, or

conditions is not a pre-requisite for finding a pre-existing “impairment or disease” when determining Second Injury Fund liability. *Johnson v. Gen. Dynamics*, 46 Ark. App. 188, 878 S.W.2d 411 (1994).

Because all parties stipulated to the fact that Junge had suffered a compensable injury, the first prong of the test for Second Injury Fund liability has been met. The second prong requires that, prior to the compensable injury, Junge suffered from a permanent partial disability or impairment. The Commission held that Junge’s claim failed under this prong because medical evidence failed to prove a disability or impairment at the time of his compensable injury.

We are satisfied that substantial evidence supports the Commission’s determination that Junge was not suffering from a permanent partial disability or impairment at the time of his injury that contributed to his current level of disability. Although Junge was diagnosed with and suffering from mild effects of Parkinson’s disease prior to his compensable injury, the disease had not yet manifested itself so as to affect his ability to work and was controlled by medication. Pursuant to the statutory definition of “disability,” Junge was required to show an incapacity to earn based on his disability—Parkinson’s disease, diabetes, and high blood pressure. There was no evidence presented that he had ever missed work or had trouble performing his job due to these pre-existing conditions prior to his compensable injury. Although the term “impairment” is undefined by statute, we are also convinced that the evidence presented at the hearing failed to support a finding of permanent partial impairment. There was no evidence presented, medical or otherwise, that Junge’s conditions had impaired

his ability to function prior to the compensable injury or contributed to his level of permanent disability.

Next Junge contends that the Commission erred in concluding that he was not permanently and totally disabled. “Permanent total disability” is defined as the inability, because of a compensable injury or occupational disease, to earn meaningful wages in the same or other employment. Ark. Code Ann. § 11-9-519(e)(1) (Repl. 2002).

Junge admits he made no effort to return to work, partially due to the fact that he had considered retiring early. Additionally, although Dr. Sherill concluded that Junge would be unable to continue manual-labor employment because of his injury, the medical records do not indicate that Junge was completely unemployable and incapable of working anywhere. Therefore, it was reasonable for the Commission to find that Junge was not completely unable to work, and we affirm the Commission’s decision that Junge was not totally disabled.

Lastly, Junge argues that the Commission erred in affixing his wage-loss disability at twenty-eight percent. The Commission is charged with the duty of determining disability based upon a consideration of medical evidence and other matters affecting wage loss, such as the claimant’s age, education, and work experience. *Emerson Elec. v. Gaston*, 75 Ark. App. 232, 236, 58 S.W.3d 848, 851 (2001). In considering factors that may affect an employee’s future earning capacity, the court considers the claimant’s motivation to return to work, because a lack of interest or a negative attitude impedes our assessment of the claimant’s loss of earning capacity. *Id.* at 237–38, 58 S.W.3d at 851–52. An injured employee’s motivation to return to work can be considered by the Commission in assessing

the employee's functional disability. *Weyerhaeuser Co. v. McGinnis*, 37 Ark. App. 91, 824 S.W.2d 406 (1992).

Junge, an educated and skilled worker, testified that he had not attempted to return to work and that he was considering retiring because of his age. A review of his work history shows that he has held several non-labor-intensive jobs over the years, including many years with the military for which he receives retirement benefits. Overall, we hold that there was substantial evidence for the Commission to weigh the evidence and find that Junge was entitled to a wage-loss disability of twenty-eight percent to his body as a whole.

Affirmed.

GRIFFEN and ROAF, JJ., agree.